Supreme Court, U. S.
FILED
JUL 10 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

MARCUS MATTSON,
ANTHONIE M. VOOGD,
605 West Olympic Boulevard,
Los Angeles, Calif. 90015,
Attorneys for Appellee.

Of Counsel:
LAWLER, FELIX & HALL.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TOPICAL INDEX

	Page
The Question Restated	1
Statutes Involved	1
Statement	2
The Question Presented Is Not Substantial	5
A. In Section 7 of the Clayton Act Congress Used Only a Limited Part of Its Constitutional Power to Regulate Commerce	6
B. The Purchase of Supplies Originating in Other States Is Insufficient to Establish Jurisdiction	15
C. The Acquired Benton Corporations Were Not Engaged in Commerce Merely Because of the Commerce Carried on by Their Customers	17
D. The Acquired Benton Corporations Were Not Engaged in Commerce by Reason of Their Use of Interstate Communications	18
E. The Question Presented in This Case Is Not the Same as the Question Presented in Gulf Oil Corp. v. Copp Paving, Inc.	19
Conclusion	20

TABLE OF AUTHORITIES CITED

Cases

Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972), cert. den. 408 U.S. 928 (1972) 10

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 7

Burke v. Ford, 389 U.S. 320 (1967) 15

Page

Ekco Prods. Co., CCH Trade Reg. Rep. ¶16,879 at 21,901 (FTC 1964), aff'd 347 F.2d 745 (7th Cir. 1965) 9

Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349 (1941) 11, 12

Golden Grain Macaroni Company v. F.T.C., 472 F.2d 882 (9th Cir. 1972) 9

Gulf Oil Corp. v. Copp Paving, Inc., No. 73-1012 now pending before this Court 19

John Kalin Funeral Home, Inc. v. Fultz, 313 F. Supp. 435 (W.D. Wash. 1970), aff'd 442 F.2d 1342 (9th Cir. 1971), cert. den. 404 U.S. 881 (1971) 19

Kirschbaum v. Walling, 316 U.S. 517 (1942) 14

Klor's Inc. v. Broadway-Hale Stores, 255 F.2d 214 (9th Cir. 1958), rev'd on other grounds, 359 U.S. 207 (1959) 8

Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954), cert. den. 348 U. S. 817 (1954) 8

Littlejohn v. Shell Oil Company, 483 F.2d 1140 (5th Cir. en banc 1973), cert. den. 414 U.S. 1116 (1973) 10

McNutt v. General Motors, 298 U.S. 178 (1936) .. 20

Page

Mitchell v. Lublin, McGaughy & Assoc., 358 U.S. 207 (1959) 11

Myers v. Shell Oil Company, 96 F.Supp. 670 (S.D. Cal. 1951) 9

Rasmussen v. American Dairy Association, 472 F. 2d 517 (9th Cir. 1973) 7

Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (5th Cir. 1972) .. 10

Transamerica Corp. v. Board of Governors, 206 F.2d 163 (3rd Cir. 1953) 14

United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954) 15

United States v. Frankfort Distilleries, 324 U.S. 293 (1945) 16

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 14

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 7

United States v. Yellow Cab Co., 332 U.S. 218 (1947) 17

Western Laundry and Linen Rental Co. v. United States, 424 F.2d 441 (1970), cert. den. 400 U.S. 849 (1970) 13

Miscellaneous

Urban Business Profile, Building Service Contracting, United States Department of Commerce, EDA-72-59582, 1972 5

Rules

Rules of the Supreme Court, Rule 43(5) 19

Statutes	Page
Clayton Act, Sec. 1	2
Clayton Act, Sec. 2, as amended by the Robinson-Patman Act (Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U.S.C. §13(a))	9, 10
Clayton Act, Sec. 2(a)	9
Clayton Act, Sec 7	1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 17, 18, 20
Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, as amended)	2
Fair Labor Standards Act, Sec. 6	11
Federal Trade Commission Act, Sec. 5(a)	11
Sherman Act, Sec. 1	6
Sherman Act, Sec. 2	6
United States Code, Title 15, Sec. 12	2, 8
United States Code, Title 15, Sec. 18	2, 8

IN THE

Supreme Court of the United States

October Term, 1973
No. 73-1689

UNITED STATES OF AMERICA,

Appellant,

vs.

AMERICAN BUILDING MAINTENANCE INDUSTRIES,

Appellee.

Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM.

Appellee moves the Court to affirm the judgment sought to be reviewed on this appeal on the ground that it is manifest that there are no material disputed questions of fact and the questions of law as to which review is sought are, on their face, without substantial merit.

The Question Restated.

May a corporation engaged in rendering janitorial services solely within a single state, using for that purpose labor obtained in that state and supplies purchased in that state, be deemed "engaged also in commerce" within that clause of Section 7 of the Clayton Act?

Statutes Involved.

Involved here is the phrase "engaged also in commerce" as it appears and is defined in the following

sections of the Clayton Act (Act of October 15, 1914, c. 323, 38 Stat. 730, as amended):

Section 7 (15 U.S.C. §18):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital * * * of another corporation *engaged also in commerce*, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *"[1]

Section 1 (15 U.S.C. §12):

> " 'Commerce', as used herein, means trade or commerce among the several States and with foreign nations * * *"

Statement.

On January 8, 1971 this action was filed to assert the illegality of the June 30, 1970 acquisition by American Building Maintenance Industries ("ABMI") of J. E. Benton Management Corporation and Benton Maintenance Company ("Benton corporations"). The sole contention was that the acquisition violated Section 7 of the Clayton Act. Notwithstanding the explicit limitation in Section 7 that the acquired corporation must be "engaged also in commerce" before Section 7 can apply, the complaint failed to allege that the acquired corporations were so engaged. It is conceded that the acquired corporations operated only within the State of California.

Since the acquiring corporation (appellee ABMI) operates in a number of states, it is not controverted

[1]Emphasis added herein unless otherwise noted.

that ABMI is "engaged in commerce." There is accordingly no issue relative to ABMI's activity, and the comments on that activity in the Jurisdictional Statement are plainly irrelevant.[2]

The court below on motion for summary judgment found that the acquired corporations were not "engaged also in commerce" and that accordingly the District Court lacked jurisdiction under Section 7 of the Clayton Act.[3] The Government makes no contention that there was any procedural impropriety in the presentation or the consideration of the motion for summary judgment or that the findings of fact are in any way erroneous. The Government disputes only the conclusions of law drawn from the findings of fact.

The findings of fact show:

1. Both Benton corporations (the acquired corporations) were engaged in the business of providing janitorial and related services. One of them, J. E. Benton Management Corporation ("Benton Management"), also engaged in the real estate and building management businesses. The Benton corporations conducted their businesses entirely within Los Angeles, Orange and Ventura Counties in California.[4]

2. The Benton corporations had no manufacturing plants, no sales or distribution outlets, no products

[2]Appellee disputes the accuracy and completeness of the Government's characterization of the acquiring company in the Jurisdictional Statement. That characterization constitutes a thinly disguised effort to argue matters not properly germane.

[3]Findings 22 through 24 of the District Court's Findings of Fact and Conclusions of Law attached as Appendix A to the Jurisdictional Statement, hereinafter "Findings".

[4]Findings, 4 and 11.

which were sold or shipped, no patents or scientific know-how, and no location or business situs advantage.[5]

3. The business of the Benton corporations in providing janitorial services, and the janitorial service business generally is an intensely local activity. No commodity is sold. The only sale made (if it be a sale) is the sale of unskilled labor of janitors necessary to clean buildings. There is no tangible property involved in the business except insignificant, incidental facilities.[6]

4. The Benton corporations purchased supplies as needed. They did not enter into any requirements or continuing supply contracts with suppliers. There are no significant economies to be realized through bulk or quantity purchase of supplies necessary to the provision of janitorial services. Supplies represent a minor part of the total costs of providing janitorial services. The basic service provided is the labor necessary to perform the cleaning work. Costs of supplies represent approximately three percent of the total amounts paid by customers for janitorial services.[7]

5. The Benton corporations purchased their supplies from suppliers in California. During the sixteen-month period prior to the acquisitions Benton Maintenance Company purchased no products which were shipped to it from outside of California and Benton Management purchased $130.35 of such products, a *de minimis* amount.[8]

6. The Benton corporations did not advertise nationally. During the eighteen-month period prior to the

[5]Findings, 5 and 12.
[6]Findings, 16.
[7]Findings, 17.
[8]Findings, 6, 7, 13 and 18.

acquisitions, these corporations' total expenses for out-of-state telephone calls related to business activities were $19.78, a *de minimis* amount.[9]

Janitorial service contractors are merely labor brokers who provide the local unskilled labor necessary to clean buildings. Equipment requirements are minimal: mops, pails, sweepers, cleansers and the like. It is difficult to conceive of an industry where entry is easier. The industry is therefore characterized by a high level of competition. Contracts with building owners are generally terminable by the owner upon thirty days' notice. Janitorial service contractors compete on the basis of price and quality of service. Such contractors face the competition of not only other contractors but also of building owners who provide their own janitorial services in-house.[10]

The Question Presented Is Not Substantial.

The Jurisdictional Statement contends that Congress, in enacting Section 7 of the Clayton Act, exercised the utmost extent of its constitutional power to regulate matters affecting commerce as it did in enacting the Sherman Act, and, accordingly, the Benton corporations were "engaged in commerce" because:

(a) They purchased in California supplies originating in other states;

(b) Certain of their customers sold products in interstate and foreign commerce; and

[9]Findings, 8, 14 and 15.

[10]See generally *Urban Business Profile, Building Service Contracting*, United States Department of Commerce, EDA-72-59582, 1972, referred to in the Affidavit of Phillip Neff.

(c) They solicited and negotiated contracts with certain customers through interstate communications.

These contentions do not give rise to a substantial question warranting review by this Court because:

(1) It is absolutely clear from the language of Section 7 and the authorities construing that section that Congress did not therein fully exercise its constitutional power over commerce;

(2) A corporation cannot be deemed in commerce merely because its customers and suppliers may be so engaged; and

(3) Assuming, *arguendo,* that Congress exercised in Section 7 the same broad control over matters affecting commerce that it exercised in the Sherman Act, the facts relied upon by the Government are wholly insufficient to establish jurisdiction.

A. In Section 7 of the Clayton Act Congress Used Only a Limited Part of Its Constitutional Power to Regulate Commerce.

Section 7 of the Clayton Act was enacted in 1914, and was amended to its present form in 1950. Both its original enactment and its amendment came years after the enactment of Sherman Act Sections 1 and 2. In the course of the 1950 amendment to Section 7 of the Clayton Act, Congress considered at length all of the deficiencies that were claimed to have existed in Section 7 as originally enacted. The 1950 amendment, however, made no change in the jurisdictional requirement that the acquired corporation must be "engaged also in commerce." Section 7 was in 1950 broadened to allow attacks upon acquisitions made by

means of the transfer of assets rather than those merely accomplished by the acquisition of stock. Notwithstanding over fifty years experience under the Sherman Act and thirty-six years experience under the Clayton Act, the restrictive jurisdictional requirement that both the acquiring and the acquired corporation must be "engaged in commerce" has remained unchanged since its original enactment in 1914.[11]

Accordingly, the intent of Congress is clear. Congress did not in the Clayton Act, or in its amendments thereto, adopt the jurisdictional test of the Sherman Act which calls only for an effect upon commerce, but instead in the Clayton Act retained and reaffirmed the jurisdictional test which requires that both the acquiring corporation and the acquired corporation be "engaged in commerce." In the Sherman Act, Congress exercised the utmost extent of its constitutional power to establish jurisdiction over restraints and monopolies.[12] In Section 7 of the Clayton Act, by contrast, Congress acted only to authorize attacks upon mergers and acquisitions where both parties to the mergers or acquisitions were "engaged in commerce."

Under the Sherman Act, with its exercise of the constitutional power to the ultimate, a defendant's conduct may either *occur in or affect* commerce. This dichotomy can be illustrated by reference to *Rasmussen v. American Dairy Association,* 472 F.2d 517 (9th Cir. 1973), where the court stated:

"The jurisdictional question [under the Sherman Act] . . . concerns Congress' power to reach

---

[11]See discussion of the legislative history in *Brown Shoe Co. v. United States,* 370 U.S. 294, 311-323 (1962).

[12]*United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558 (1944).

the defendant's conduct: '[T]he restraint must occur in or affect commerce between the states . . . *for constitutional reasons.*'" (472 F.2d 522, citing *Klor's Inc. v. Broadway-Hale Stores,* 255 F. 2d 214, 224 (9th Cir. 1958), *reversed on other grounds,* 359 U.S. 207 (1959), emphasis in original).

The two tests of jurisdiction under the Sherman Act are defined in *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732 (9th Cir. 1954), *cert. den.* 348 U.S. 817 (1954), as follows:

"(1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.

"(2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but, substantially *affected* interstate commerce [the 'effect on commerce' theory]." (210 F.2d 739, n. 3, emphasis in original).

Of these two theories, Congress adopted only the "in commerce" test in enacting Section 7 of the Clayton Act. This is clear from the use of the words "engaged in commerce" in Section 7, as follows:

"No corporation *engaged in commerce* shall acquire * * * the stock * * * of another corporation *engaged also in commerce,* where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C. §18).

Further, "commerce" is defined in Section 1 of the Clayton Act as meaning "trade or commerce among the several States and with foreign nations," the movement of goods and services between states and foreign nations.

Thus, in the clearest possible language, Section 7 requires that *both* the acquiring and acquired corporations be engaged in interstate commerce. This requirement is conceded by the Government and is uniformly recognized. *Ekco Prods. Co.,* CCH Trade Reg. Rep. ¶16,879 at 21,901 (FTC 1964), *aff'd* 347 F.2d 745 (7th Cir. 1965); *Golden Grain Macaroni Company v. F.T.C.,* 472 F.2d 882, 887 (9th Cir. 1972). This dual requirement that both corporations be engaged in commerce negates any possibility of concluding that Congress intended to exercise its full constitutional powers over commerce in Section 7.

The words "engaged in commerce" appear elsewhere in the Clayton Act and are uniformly interpreted as adopting the "in commerce" test of jurisdiction. Section 2(a) of the Clayton Act[13] was thus construed in *Myers v. Shell Oil Company,* 96 F.Supp. 670, 675 (S.D. Cal. 1951) as follows:

"In enacting the Sherman Act, Congress intended to exercise all the power it possessed over interstate commerce. Congress has the power to regulate intrastate activities which affect interstate

---

[13]Section 2 of the Clayton Act as amended by the Robinson-Patman Act (Act of June 19, 1936, c. 592, 49 Stat. 1526, 15 U.S.C. §13(a)) provides in pertinent part:

"(a) It shall be unlawful for *any person engaged in commerce, in the course of such commerce,* either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce,* * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce * * *."

commerce or trade, if the regulation of intrastate activities is necessary and approprate [sic] to protect the free flow of interstate commerce. In short, any intrastate activity is subject to the regulatory power of Congress if it *affects* interstate commerce in any way in a substantial manner, and Congress in enacting the Sherman Act intended it to apply to such activity or conduct.

"Section 2(a, c, d, f), 15 U.S.C.A. § 13 (a, c, d, f), and Section 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13a, contain, however, the specific language that it shall be unlawful for any person '*engaged in commerce*' to do any of the prescribed acts '*in the course of such commerce*'. Thus, in enacting the provisions of the Clayton and Robinson-Patman Acts here under consideration, Congress did not exercise all of its power over commerce, but dealt only with persons engaged *in commerce* and with restraints *in the course of commerce*." (Emphasis in original.)

Also in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, 418 (5th Cir. 1972), the court stated "failure of any party to have any interstate business disposes of the Clayton Act and Robinson-Patman Act claims." It is for this reason that the courts have held that at least one of the discriminatory sales must cross a state line to fulfill the statutory requirement of Section 2(a) that the sales be "in commerce." *Littlejohn v. Shell Oil Company*, 483 F.2d 1140, 1144 (5th Cir. *en banc* 1973), *cert. den.* 414 U.S. 1116 (1973); *Belliston v. Texaco, Inc.*, 455 F.2d 175, 178 (10th Cir. 1972), *cert. den.* 408 U.S. 928 (1972).

The jurisdictional phrase "engaged in commerce" or "in commerce" appears in other legislation and has uniformly been recognized by the Court as ineffective to establish an "effect on commerce" test of jurisdiction.

In *Mitchell v. Lublin, McGaughy & Assoc.*, 358 U.S. 207 (1959), the Court was called upon to determine whether certain non-professional employees were "engaged in commerce", as that phrase was used in Section 6 of the Fair Labor Standards Act.[14] The Court, per Chief Justice Warren, stated:

> "We start with the premise that Congress, by excluding from the Act's coverage employees whose activities merely 'affect commerce,' indicated its intent not to make the scope of the Act coextensive with its power to regulate commerce." (358 U.S. at 211).

In *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349 (1941) the Court interpreted the words "in commerce" as they appear in Section 5(a) of the Federal Trade Commission Act,[15] and concluded, per Mr. Justice Frankfurter:

> "This case presents the narrow question of what Congress did, not what it could do. And we mere-

---

[14]Prior to its amendment in 1966, Section 6 of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U.S.C. §206), provided:

> "(a) Every employer shall pay to each of his employees who is *engaged in commerce* or in the production of goods for commerce wages at the following rates: * * *"

[15]Section 5(a) of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 719, as amended, 15 U.S.C. §45) provides in pertinent part that:

> "Unfair methods of competition *in commerce*, and unfair or deceptive acts or practices *in commerce*, are hereby declared unlawful."

ly hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all of the relevant considerations, much clearer manifestation of intention than Congress has furnished." (312 U.S. 355).

There is no reason to believe that Congress intended the phrase "engaged in commerce" to have a broader meaning in 1914 when it enacted the Clayton Act or in 1950 when it amended the Act than the meaning intended for the phrase in 1938 when it enacted the Fair Labor Standards Act. Further, those words manifest no different or broader Congressional intent than the words "in commerce" used in the Federal Trade Commission Act.

Accordingly, it is manifest from the language of the statute that Congress did not fully exercise its constitutional power to regulate matters affecting commerce in enacting Section 7 of the Clayton Act.

The Appellant's Jurisdictional Statement advances three equally untenable arguments in support of its contention that jurisdiction under Section 7 can be established by showing the acts complained of affected commerce.

First, the Government refers to the Section 7 language which prohibits acquisitions "where in any line of commerce in any section of the country, the effect of the acquisition may be substantially to lessen competition, or tend to create a monopoly" and argues that this language gives the Court jurisdiction if the "effect of the acquisition" is to lessen competition substantially or tend to create a monopoly in a line of commerce.

The argument, however, ignores the fact that Section 7 is explicitly limited to acquisitions by a corporation "engaged in commerce" of the stock of another corporation "engaged also in commerce." For the Government's argument to have any validity whatever, it would be necessary to give no recognition at all to the phraseology in Section 7 making the section applicable only when there is an acquisition by a corporation engaged in commerce of the stock of another corporation engaged in commerce. Congress was remarkably explicit in defining in the jurisdictional sense those whose transactions are subject to the prohibitions of the section. Unlike other anti-trust laws, which apply without limitation to the complete spectrum of natural persons and artificial entities,[16] Section 7 is limited at the outset to corporations, another evidence that Congress did not fully exercise the utmost extent of its constitutional power over commerce. Congress not only limited the application of Section 7 to a class consisting solely of corporations, but further limited that class to corporations engaged in commerce. It is only after the parties to the acquisition are determined to be parties made subject to Section 7 that the transaction can be put to the test proscribed by the section.

Second, the Government asserts that in 1950 when Congress strengthened Section 7 to prohibit in their incipiency anticompetitive activities it must have intended to exercise the full reach of its commerce power, otherwise its attempt to deal with incipient anticompetitive practices would have been weakened. As noted above, Congress did not change in any way the jurisdic-

---

[16]*Western Laundry and Linen Rental Co. v. United States,* 424 F.2d 441, 443 (1970), *cert. den.* 400 U.S. 849 (1970).

tional requirements of Section 7 when it amended that statute in 1950. It would be peculiar statutory interpretation indeed to conclude that Congress intended to expand the jurisdictional test created by the words "engaged also in commerce" by reenacting those words without change. Such statutory interpretation is exactly what the Court condemned in *Kirschbaum v. Walling*, 316 U.S. 517 (1942), per Mr. Justice Frankfurter, as follows:

> "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justifies the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation." (316 U.S. 522).

Third, the Government cites *Transamerica Corp. v. Board of Governors*, 206 F.2d 163 (3rd Cir. 1953) for the proposition that Section 7 represents the broadest possible exercise of Congressional power over commerce. The most that can be said of that case is that it held that banking is commerce, a fact recognized in *United States v. Philadelphia National Bank*, 374 U.S. 321, 336, n. 12 (1963). Moreover, because commercial banking is of necessity interstate it was conceded that the acquired banks were corporations engaged in commerce. Clearly, there is nothing in *Transamerica Corp.* from which it can be argued that language in

Section 7 can be disregarded that expressly makes the section applicable only when the acquired corporation is "engaged also in commerce."

B. The Purchase of Supplies Originating in Other States Is Insufficient to Establish Jurisdiction.

The Government contends that the acquired Benton corporations were engaged in commerce because they purchased supplies within California which originated outside of California. It is, of course, fundamental that goods once in commerce do not remain in commerce indefinitely. The interstate commerce in goods does terminate. *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954).

The court below reviewed the voluminous briefs and affidavits of the parties, applied the rules as to when commerce in goods ceases, and concluded that none of the supplies that originated out of California were in commerce when purchased by the Benton corporations. The Government's appeal does not question this. Instead the Government contends that the simple fact that the Benton corporations purchased goods originating out-of-state establishes jurisdiction because such purchases have been recognized in Sherman Act cases as sufficient to establish the requisite effect upon interstate commerce.

As noted above, jurisdiction under Section 7 cannot be established by a showing of an effect on commerce. However, even assuming *arguendo* that it did, the purchase by the Benton corporations in California of supplies originating out-of-state is wholly insufficient to establish jurisdiction under that test. The Sherman Act cases cited by the Government, *Burke v. Ford*, 389 U.S. 320 (1967), and *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954), do not hold that the

in-state purchase of goods originating out-of-state establishes Sherman Act jurisdiction; they hold that local restraints which do not occur in interstate commerce come within the scope of the Sherman Act if they *substantially affect interstate commerce.*

In the present case the Government failed to plead or prove any effect, let alone a substantial effect, on the interstate commerce in janitorial supplies arising from the acquisition of the Benton corporations. The complaint alleges only that the "effect of the aforesaid acquisition and merger may be to substantially lessen competition or tend to create a monopoly in the sale of janitorial services in Southern California and the Los Angeles area. . . ." The court below found, and the Government does not contest, that supplies represent a minor part of the total costs of providing janitorial services, approximately three percent of the total amounts paid by customers for janitorial services.[17]

In *United States v. Frankfort Distilleries,* 324 U.S. 293 (1945), a Sherman Act case, Mr. Justice Black noted:

> "* * * [The Supreme] Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." (324 U.S. 297).

The effect, if any, of the acquisition of the Benton corporations upon the interstate commerce in supplies was neither substantial nor direct. The local purchase of

[17]Findings, 17.

supplies by the Benton corporations raises no substantial questions warranting review under either the "effect on commerce" or "engaged in commerce" jurisdictional tests.

C. The Acquired Benton Corporations Were Not Engaged in Commerce Merely Because of the Commerce Carried on by Their Customers.

The Government's Jurisdictional Statement indicates that a corporation performing janitorial services for companies that sell products in interstate and foreign commerce is itself engaged in commerce for purposes of Section 7 of the Clayton Act. This simply is not so. The normal and spontaneous meaning of the words "another corporation engaged also in commerce" is that the corporation itself must be engaged in interstate commerce.

The Court has taught that "interstate commerce is an intensely practical concept drawn from the normal and accepted course of business." *United States v. Yellow Cab Co.,* 332 U.S. 218, 231 (1947). It is not a practical concept to consider a local janitorial service corporation is engaged in the interstate and foreign commerce in such products as petroleum, milk and spacecraft simply because the corporation cleans buildings operated by customers who sell those products in interstate and foreign commerce.

As in the case of supplies originating out of state, the Government contends that the Benton corporations were engaged in the commerce of their customers because their acquisition affected that commerce. Here also, the Government failed to plead or prove any substantial or direct effect on commerce arising from the acquisition.

D. The Acquired Benton Corporations Were Not Engaged in Commerce by Reason of Their Use of Interstate Communications.

The Government's Jurisdictional Statement further indicates that a corporation which solicits and negotiates contracts by means of interstate communications is "engaged in commerce" for purposes of Section 7 of the Clayton Act. Specifically, it is asserted that the janitorial services contract with Tishman "was executed by Tishman executives based in New York" and a New York Life Insurance contract "was the product of interstate negotiations."[18]

As to this the record shows only a *de minimis* use of interstate communications by the acquired Benton corporations. Their total expenses for out-of-state telephone calls relating to business activities during the period of eighteen months preceding the acquisition amounted to only $19.78.[19] A total of 203 interstate mail items were sent or received by those corporations, only a few of which related to the solicitation or negotiation of contracts.[20] The total expenditures during the eighteen-month period for all of those mail items would amount to only $22.33, assuming an 11¢ airmail stamp was used for each of the 203 items.

Aside from the *de minimis* nature of the acquired Benton corporations' use of interstate communications, it is clear that in any event jurisdiction cannot be based upon the mere use of interstate communications.

---

[18]Jurisdictional Statement, page 6.

[19]Findings, 15.

[20]Affidavit of John D. Gaffey.

This is illustrated by *John Kalin Funeral Home, Inc. v. Fultz*, 313 F.Supp. 435 (W.D. Wash. 1970), *aff'd* 442 F.2d 1342 (9th Cir. 1971), *cert. den.* 404 U.S. 881 (1971), in which the Court stated:

> "No authority has been cited or found directly or indirectly sustaining Sherman Act jurisdiction based merely upon interstate communications conducted in the regular course of an otherwise purely local business." (313 F.Supp. 438-439).

E. The Question Presented in This Case Is Not the Same as the Question Presented in Gulf Oil Corp. v. Copp Paving, Inc.

While in both this case and *Gulf Oil Corp. v. Copp Paving, Inc.*, No. 73-1012 now pending before this Court, there is an unwarranted effort to misread Section 7 of the Clayton Act, it would serve no purpose to allow this appeal in order to have the cases heard together as the Government suggests. In *Gulf Oil Corp.* the question is whether the intrastate manufacture and sale of a commodity used in the construction of an interstate highway makes the supplier a corporation "engaged also in commerce." Unlike *Gulf Oil Corp.* there is here no instrumentality of interstate commerce to which any commodity is furnished. Determination of the question in this case should not be confused by having the cases heard together. The questions involved in the two cases being different, it would not be useful or appropriate under Supreme Court Rule 43(5) for them to be argued or heard together as one case.

Conclusion.

Since federal courts have limited jurisdiction the party seeking to invoke that jurisdiction must plead and show by preponderance of the evidence facts establishing that jurisdiction. *McNutt v. General Motors,* 298 U.S. 178, 189 (1936). The court below applied the well-established jurisdictional standards of Section 7 of the Clayton Act to the facts shown by the Government and properly concluded it lacked jurisdiction. Specifically, the court held it is without jurisdiction in a case arising under Section 7 unless both the acquired corporation and the acquiring corporation were engaged in commerce. The Jurisdictional Statement raises no substantial question of law regarding those standards warranting review by this Court and points to no substantial competent evidence that the acquired corporations in this case were engaged in commerce. Accordingly, Appellee's motion to affirm should be granted.

Respectfully submitted,

MARCUS MATTSON,
ANTHONIE M. VOOGD,
Attorneys for Appellee.

Of Counsel:
LAWLER, FELIX & HALL.